

place of the incident giving rise to the claim will apply to claims arising in the United States, its commonwealths, territories and possessions prior to September 1, 1995. The general principles of U.S. tort law will apply to property damage or loss claims arising outside the United States prior to September 1, 1995. Established principles of general maritime law will apply to injury or death claims arising outside the United States prior to September 1, 1995. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) and federal case law. Where general maritime law provides no guidance, the general principles of U.S. tort law will apply.

(c) *The Foreign Claims Act.* See subpart J of this part. The law of the place of occurrence applies to the resolution of claims. However, the law of damages set forth in § 536.139 will serve as a guide.

(d) *The Army Maritime Claims Settlement Act.* Maritime law applies.

(e) *Damages not payable.* Under all subparts, property loss or damage refers to actual tangible property. Accordingly, consequential damages, including, but not limited to bail, interest (prejudgment or otherwise), or court costs are not payable. Costs of preparing, filing, and pursuing a claim, including expert witness fees, are not payable. The payment of punitive damages, that is, damages in addition to general and special damages that are otherwise payable, is prohibited. See DA Pam 27-162, paragraphs 2-56 and 3-4b.

(f) *Source of attorney's fees.* Attorney's fees are taken from the settlement amount and not added thereto. They may not exceed 20 percent of the settlement amount under any subpart.

NOTE TO § 536.50: For further discussion see DA Pam 27-162, paragraph 2-51.

#### § 536.51 Collateral source rule.

Where permitted by applicable state or maritime law, damages recovered from collateral sources are payable under subparts D and H, but not under subparts C, E, F, or J of this part. For further discussion see DA Pam 27-162, paragraph 2-57.

#### § 536.52 Subrogation.

Subrogation is the substitution of one person in place of another with regard to a claim, demand or right. It should not be confused with a lien, which is an obligation of the claimant. Applicable state law should be researched to determine the distinction between subrogation and a lien. Subrogation claims are payable under subparts D and H, but not under subparts C, E, F or J of this part. For further discussion see DA Pam 27-162, paragraph 2-58.

#### § 536.53 Evaluation of claims—general rules and guidelines.

(a) Before claims personnel evaluate a claim:

(1) A claimant or claimant's legal representative will be furnished the opportunity to substantiate the claim by providing essential documentary evidence according to the claim's nature including, but not instead of, the following: Medical records and reports, witness statements, itemized bills and paid receipts, estimates, federal tax returns, W-2 forms or similar proof of loss of earnings, photographs, and reports of appraisals or investigation. If necessary, request permission, through the legal representative, to interview the claimant, the claimant's family, proposed witnesses and treating health care providers (HCPs). In a professional negligence claim, the claimant will submit an expert opinion when requested. State law concerning the requirement for an affidavit of merit should be cited.

(2) When the claimant or the legal representative fails to respond in a timely manner to informal demands for documentary evidence, interviews, or an independent medical examination (IME), make a written request. Such written request provides notice to the claimant that failure to provide substantiating evidence will result in an evaluation of the claim based only on information currently in the file. When, despite the government's request, there is insufficient information in the file to permit evaluation, the claim will be denied for failure to document it. Failure to submit to an IME or sign an authorization to use medical information protected by HIPAA, for

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review or evaluation by a source other than claims personnel, are both grounds for denial for failure to document, provided such evaluation is essential to the determination of liability or damages. State a time limit, for example, 30 or 60 days, to furnish the substantiation or expert opinion required in a medical malpractice claim.

(3) If, in exchange for complying with the government's request for the foregoing information, the claimant or the legal representative requests similar information from the file, the claimant may be provided such information and documentation as is releasable under the Federal Rules of Civil Procedure (FRCP). Additionally, work product may be released if such release will help settle the claim. See § 536.18.

(b) An evaluation should be viewed from the claimant's perspective. In other words, before denying a claim, first determine whether there is any reasonable basis for compromise. Certain jurisdictional issues and statutory bases may not be open for compromise. The incident to service and FECA exclusions are rarely subject to compromise, whereas the SOL is more subject to compromise. Factual and legal disputes are compromisable, frequently providing a basis for limiting damages, not necessarily grounds for denial. Where a precise issue of dispute is identified and is otherwise unresolvable, mediation by a disinterested qualified person, such as a federal judge, or foreign equivalent for claims arising under the FCA, should be obtained upon agreement with the claimant or the claimant's legal representative. Contributory negligence has given way to comparative negligence in most United States jurisdictions. In most foreign countries, comparative negligence is the rule of law.

NOTE TO § 536.53: For further discussion see DA Pam 27-162, paragraph 2-59.

### § 536.54 Joint tortfeasors.

When joint tortfeasors are liable, it is DA policy to pay only the fair share of a claim attributable to the fault of the United States rather than pay the claim in full and then bring suit against the joint tortfeasor for contribution. If payment from a joint tortfeasor is not forthcoming after the

CJA's demand, the United States should settle for its fair share, provided the claimant is willing to hold the United States harmless. Where a joint tortfeasor's liability greatly outweighs that of the United States, the claim should be referred to the joint tortfeasor for action.

### § 536.55 Structured settlements.

(a) The use of future periodic payments, including reversionary medical trusts, is encouraged to ensure that the injured party is adequately compensated and able to meet future needs.

(1) It is necessary to ensure adequate care and compensation for a minor or other incompetent claimant or unemployed survivor over a period of years.

(2) A medical trust is necessary to ensure the long-term availability of funds for anticipated future medical care, the cost of which is difficult to predict.

(3) The injured party's life expectancy cannot be reasonably determined or is likely to be shortened.

(b) Under subpart D of this part, structured settlements cannot be required but are encouraged in situations listed above or where state law permits them. In the case of a minor, every effort should be made to insure that the minor, and not the parents, receives the benefit of the settlement. Annuity payments at the age of majority should be considered. If rejected, a blocked bank account may be used.

(c) It is the policy of the Department of Justice never to discuss the tax-free nature of a structured settlement.

NOTE TO § 536.55: For further discussion, see DA Pam 27-162, paragraph 2-63.

### § 536.56 Negotiations—purpose and extent.

It is DA policy to settle meritorious claims promptly and fairly through direct negotiation at the lowest possible level. The Army's negotiator should not admit liability as such is not necessary. However, the settlement should reflect diminished value where contributory negligence or other value-diminishing factors exist. The negotiator should be thoroughly familiar with all aspects of the case, including the claimant's background, the key witnesses, the anticipated testimony and